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June 28, 1991

VIA FACSIMILE

Cynthia Catri, Esquire
U. S. Environmental Protection Agency
Office of Regional Counsels (RCV-23)
JFK Federal Building
Boston, MA 02203

Re: Post Machinery Company, Inc.
Coakley Landfill Superfund Site
North Hampton, NH

Dear Attorney Catri:

This law firm represents Post Machinery Company, Inc., which received a special notice letter on April 1, 1991 in connection with the Coakley Landfill Superfund Site ("Site") in North Hampton, New Hampshire. Without any admission of fact or liability concerning Post Machinery Company, Inc.'s involvement in the site, and without waiving any defenses to any administrative order that may be issued under the Comprehensive Environmental Response Compensation and Liability Act (CERCLA), I am writing to request that any and all enforcement actions which may in the future be taken by the U.S. EPA in connection with this site be directed not against Post Machinery Company, Inc. but against the Paxall Group, Inc., which owned and operated the subject manufacturing facility from the time it was relocated there from Massachusetts in January 1977 until it sold the facility in 1984. For the reasons set forth in this letter, the current owner of Post is not liable for the Coakley Landfill situation and therefore requests that it not be included in any future enforcement actions by the EPA in connection with the site.

The Paxall Group, Inc. ("Paxall") is a Delaware corporation with its principal place of business at 7515 North Linder Avenue, Skokie, Illinois 60077. Paxall's President and Chief Executive Officer is Brian Read. Paxall is represented by Stephen N. Gatlin, Esquire of the law firm of Gardner, Carton and Douglas, Suite 3400-Quaker Tower, 321 North Clark Street, Chicago, Illinois 60610-4795.

Paxall owned and operated Post Machinery Company as an unincorporated division until September 6, 1984. In January 1977, Paxall moved the Post Machinery Company to Portsmouth, New Hampshire. Pursuant to an Assets Purchase Agreement dated September 6, 1984 (hereinafter "Agreement"), Post Machinery Company, Inc., a New Hampshire corporation (hereinafter "Post-NH"), purchased the assets of this unincorporated division from Paxall. You should note that this acquisition of assets did not leave Paxall as an empty shell. To the contrary, Paxall continued to operate several divisions in various areas including Illinois, New Jersey and California. In June 1990, Post-NH, through a series of mergers, was merged into Post Machinery Company, Inc., a Delaware corporation ("Post") with the latter as the surviving corporation. Post is a wholly-owned subsidiary of Stevens Graphics Corporation, 5500 Airport Freeway, Fort Worth, Texas 78113-3330. For sake of clarity, this letter makes references to both Post-NH and Post, although it must be understood that Post-NH no longer exists and that there is a current identity of interests between Post-NH and Post.

As Post-NH did not acquire all of the assets of Paxall, but only one of Paxall's unincorporated divisions, Post-NH is not a successor corporation at all. Even if Post-NH were deemed a successor corporation, the facts of the 1984 asset purchase do not result in successor liability. It is well established that a purchase of assets transfers liability to the acquiring corporation in only four limited instances: (1) the purchasing corporation expressly or impliedly agrees to assume the liability; (2) the transaction amounts to a de facto merger; (3) the purchasing corporation is merely a continuation of the selling corporation; or (4) the transaction was fraudulently entered into to escape liability. See Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990); In Re Acushnet and New Bedford Harbor, 712 F.Supp. 1010 (D.Mass. 1989), and EPA Memorandum from Courtney M. Price, Asst. Administrator for Enforcement and Compliance Monitoring (June 13, 1984). The expansion of a fifth theory of liability, the "product line theory," into environmental law has been almost universally rejected.

1. Post-NH did not expressly or impliedly agree to assume liability.

With certain exceptions enumerated in the Agreement, Post-NH did not assume Paxall's liabilities incurred in connection with the Post division. In fact, Paxall expressly agreed in the Agreement to indemnify and hold Post-NH harmless from all liability and costs incurred in connection with such environmental contamination. Post-NH did not assume and Paxall did retain all liability for environmental contamination attributable to the operations of the division prior to September 6, 1984.

The Agreement between Post-NH, as "purchaser", and Paxall as "seller" provides, among other things, as follows:

> 11. Indemnification of Purchaser.
>
> (a) . . . [S]ubsequent to Closing, Seller shall indemnify and save Purchaser and each of its shareholders, subsidiaries, affiliates, officers and directors harmless from, against, and for and in respect of:
>
> (i) any and all damages, losses, settlement payments, obligations, liabilities, claims, actions or causes of action, encumbrances and reasonable costs and expenses suffered, sustained, incurred or required to be paid by any indemnified party because of . . . (C) the assertion against Purchaser or the Purchased Assets of any liability or obligation of Seller or its affiliates or relating to Seller's operations or any of the Purchased Assets prior to the Closing Date, whether absolute or contingent, matured or unmatured, known or unknown, other than liabilities and obligations expressly assumed by Purchaser under Article 5 hereof;
>
> (ii) all reasonable costs and expenses (including, without limitation, attorney's fees, interest and penalties) incurred by any indemnified party in connection with any action, suit, proceeding, demand, assessment or judgment incident to any of the matters indemnified

against in this Article 11. (Emphasis added.)

Article 5 of the Agreement sets out those liabilities and obligations assumed by the Purchaser, Post-N.H. That Article nowhere provides for assumption by the Purchaser of any liabilities or obligations arising out of environmental contamination caused by Paxall prior to September of 1984. To the contrary, Paragraph 5(b)(v) expressly provides that the Seller bear "any liability or obligation arising out of the wrongful or unlawful generation, discharge, handling, shipment or storage of any environmental pollutants by the Division occurring on or prior to the Closing." Thus, Paxall explicitly contracted to accept responsibility for any and all environmental pollutant matters arising out of operations that occurred prior to 1984. Since the Coakley Landfill closed in 1982, it is beyond dispute that any liability arising in connection with the Coakley site is the sole responsibility of Paxall.

2. The asset purchase did not constitute a de facto merger.

As Paxall has not been dissolved, and is still an operating corporation, it is obvious that no merger occurred. Furthermore, Paxall did not take back any shares of Post-NH as part of the transaction. Therefore, there was no continuity of shareholders, an essential element in a de facto merger. See Louisiana-Pacific v. Asarco, Inc., 909 F.2d 1260, 1264 (9th Cir. 1990); Arnold Graphics Indus. v. Independent Agent Center, Inc., 775 F.2d 38, 42 (2d Cir. 1985) and Dayton v. Peck, Stow & Wilcox Co., 739 F.2d 690, 693 (1st Cir. 1984).

3. Post-NH is not merely a continuation of the selling corporation.

As Paxall is still in existence, it is unreasonable to conclude that Post is a continuation of Paxall. Post-NH and its successors are in actuality wholly independent and new corporations that perform only a fraction of the functions that Paxall did, and still does, perform. Even if successor liability law were expanded to include successors of unincorporated business divisions, there are significant differences between the Paxall division and Post-NH. Most important, the Coakley Landfill site was shut down in 1982. Therefore, any contact with the site ceased two years before the asset acquisition.

Furthermore, as no director from Paxall has ever sat on Post-NH's Board, there has been no continuity of control. Although one of Paxall's officers did acquire control of Post-NH in the asset acquisition, he was only one of the individuals who contributed equity for the transaction, and he was the only former Paxall officer to do so. Also, Post-NH and Paxall did not have identical bank financing, and utilized different insurers. No federal court has expanded the "mere continuity" exception to include the EPA's suggested "continuity of business operations" theory of liability in a CERCLA case. Any such expansion would be especially inappropriate in this case where Paxall is still a vibrant corporation.

4. The asset acquisition was not a fraudulent transaction to escape liability.

As almost $4 million was paid to acquire the assets of the Paxall division, there can be no argument that consideration was inadequate. Furthermore, as the parties to the asset agreement specifically agreed that liability for any environmental contamination would remain with Paxall, it can not be said that the asset acquisition was an attempt to escape liability.

5. The product line theory of liability has been universally rejected under CERCLA.

Although some courts have accepted the theory of "product line liability" in the product liability field, no federal circuit has embraced such a theory under CERCLA. Rather, the federal courts have applied the "majority rule," under which the courts have found successor corporations liable in CERCLA cases involving asset transfers, on the basis of the four exceptions discussed above. These courts have relied on both federal common law and state law. However, regardless of the source of law, all have applied the majority rule of non-liability with its four exceptions, and have declined to engraft a fifth "product line" exception. See Anspec, Inc. v. Johnson Controls, Inc., et al., 922 F.2d 1240 (6th Cir. 1991) (not necessary to fashion a federal common law rule, case remanded with instructions to apply majority rule under Michigan law on issue of successor liability); Philadelphia Electric Company v. Hercules, Inc., 762 F.2d 303 (3rd Cir. 1985) (court applied majority rule under Pennsylvania law); Louisiana-Pacific Corp. v. Asarco, Inc., 29 ERC 1450 (D.C. Wash. 1989) (no need to go beyond state law since majority rule would

govern under both Washington and federal common law);[1] In Re Acushnet River and New Bedford Harbor Proceedings, 712 F.Supp. 1010 (D.C. Mass. 1989) (citing Smith Land in support of a uniform federal rule that follows the majority rule); Michigan v. Thomas Solvent Company, 29 ERC 1119 (D.C. W. Mich. 1988) (court adopted majority rule as a uniform federal rule); U.S. v. Vertac Chemical Corporation, 671 F.Supp. 595, 26 ERC 1916 (D.E. Ark. 1987) vacated 855 F.2d 856 (8th Cir. 1988) (lower court relied on the majority rule, citing Arkansas law and federal cases applying the majority rule); U.S. v. Bliss, 667 F.Supp. 1298, 26 ERC 1405 (D.E.Mo. 1987) (the court stated, in dictum, that state law should govern questions of successor liability because extent of corporate liability is only of derivative importance to CERCLA, but is at the core of state regulation of corporate behavior).

The New Hampshire Supreme Court has expressly rejected the product line theory of successor liability in the context of a products liability case, Simoneau v. South Bend Lathe, Inc., 130 N.H. 466, 543 A.2d 407 (1988), and therefore, can be expected to reject such a theory in a non-products liability case. Hence, whether a court were to derive its law of successor liability from the federal common law or New Hampshire law, the result would be the same in this instance: namely, a finding that Post-NH and Post are not liable as successors to Paxall.

SUMMARY

On the basis of this information, neither Post nor its predecessor-in-interest, Post-NH, should be held to account for the liabilities incurred by the Paxall Group resulting from Paxall's shipment of wastes to the site during the period 1977 to 1982. Considering that the asset acquisition did not occur until two years after the site closed, that none of Paxall's directors have ever sat on the Boards of Post-NH or Post, that Paxall did not take back any shares of stock in Post-NH, that Paxall is still a vibrant entity, and that the parties have expressly agreed that Paxall will be liable for any such

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1. Although the case reached the Ninth Circuit Court of Appeals, the issue of product line liability was not argued and therefore not addressed. Louisiana-Pacific Corp. v. Asarco, Inc., 909 F.2d 1260 (9th Cir. 1990).

liability, we request that any and all enforcement actions which may in the future be taken by the U.S. EPA in connection with this site be directed not against Post Machinery Company, Inc., but against the Paxall Group, Inc.

To the best of my knowledge, this situation is very similar to that of another PRP at the Coakley site, namely Booth Fisheries Company ("Booth"). Booth owned and operated a fish processing plant between 1972 and 1982 in Portsmouth, and later sold it to National Sea Products. However, rather than naming National Sea Products as a PRP, EPA named Booth, the company that owned the facility during the time that dumping allegedly occurred. The fairness of EPA's approach in that instance is manifest, and Post asks only that it receive similar fair treatment.

If you have any questions, or if I may be of any further assistance in this matter, please do not hesitate to contact me at (603) 627-8122.

Very truly yours,

Thomas S. Burack

TSB/slb

cc: Elizabeth Yu, Esq.